

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK STANLEY SCHUBACH,

Defendant-Appellant.

UNPUBLISHED

January 11, 2000

No. 210554

Huron Circuit Court

LC No. 97-003937 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

JANSEN, J. (concurring).

I agree with the majority opinion insofar as it holds that the trial court abused its discretion in admitting the complainant's grandmother's hearsay testimony under the excited utterance exception because MRE 803(2) does not apply to the complainant's statements and the admission of the testimony clearly prejudiced defendant's rights.

I do not, however, agree with the majority's treatment of the psychological report. Although I am not convinced that the trial court ruled incorrectly that the report was not relevant, I think that additional analysis is required concerning the admissibility of this report. Before considering whether the probative value of the report is substantially outweighed by the danger of unfair prejudice, MRE 403, the trial court should consider whether the evidence is from a recognized discipline that will assist the trier of fact to determine a fact in issue and presented by a witness qualified by knowledge, skill, experience, training, or education, MRE 702. See also, *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995) (admissibility of expert testimony concerning battered woman syndrome); *People v Hubbard*, 209 Mich App 234, 239-241; 530 NW2d 130 (1995) (expert testimony of drug profiles is not admissible as substantive evidence of a defendant's guilt). Although our Supreme Court appears to have further opened the door to permit child sexual abuse expert testimony, *People v Lukity*, 460 Mich 484, 500-502; 596 NW2d 607 (1999); *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), MRE 702 still requires that the evidence be from a *recognized* scientific, technical, or other specialized discipline.

Moreover, even if this initial foundational requirement is met, MRE 404(a) may well preclude the admissibility of the psychological report because the report appears to do that which MRE 404(a)

specifically provides that it may not. That is, “[e]vidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,” and the report seems to do nothing more than state that the defendant is not a pedophile, therefore, it is not likely that he molested the complainant.

I otherwise agree to reverse and remand for a new trial based on the trial court’s erroneous admission of the complainant’s grandmother’s testimony under MRE 803(2) and because the error was not harmless.

/s/ Kathleen Jansen